People with cognitive and mental health impairments in the criminal justice system

Submission to NSW Law Reform Commission on Consultation Paper 7: Diversion

Shopfront Youth Legal Centre, June 2010

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under.

Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront employs 4 solicitors (3.1 full-time equivalent), 3 legal assistants (2.4 full time equivalent), a paralegal and a social worker (on secondment from the Public Interest Advocacy Centre Mental Health Legal Services Project). We are also assisted by a number of volunteers.

The Shopfront represents young people in criminal matters, mainly in the Local, Children's and District Courts. We prioritise those young people who are the most vulnerable, including those in need of more intensive support and continuity of representation than the Legal Aid system can provide. Our solicitors have extensive experience in making s32 and 33 applications in the Local and Children's Courts.

The Shopfront also assists clients to pursue victims' compensation claims and deal with unpaid fines. We also provide advice and referrals on range of legal issues including family law, child welfare, administrative and civil matters.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

We refer to our preliminary submission to this reference, dated 15 May 2007.

We welcome the opportunity to comment further on issues relating to diversion.

At the end of this submission we will also make some general comments on issues arising from your other consultation papers. Unfortunately, time does not permit us to comment comprehensively on each consultation paper.

We would be happy to comment further on any aspect of this submission, or attend any relevant consultations. In this regard please feel free to contact Jane Sanders, Principal Solicitor, on 9322 4808 or at jane.sanders@freehills.com.

Section 1: The concept of diversion

At the outset, we wish to make some brief comments on the concept of diversion.

The comments in section 1 of your consultation paper appear to be based on the assumption that diversion only applies to people who have committed offences. The use of the term "offender" and the discussion of diversion as an alternative to punishment reflects this. In our opinion, the concept of diversion also applies to *alleged* offenders, that is people who are suspected or accused of offences but who may not in fact be guilty.

As part of the rationale for section 32 and section 33, as we understand them, is to provide an alternative *process* by which alleged offenders can be dealt with. The purpose of the sections is not simply to provide sentencing alternatives for people who have committed offences.

However, we continue to support the breadth of scope of when a s32 or s33 application can be made, that is, "at the commencement or at any time during the course of the hearing of the proceedings." This includes when a plea of guilty has been already entered. Our experience is that there are many scenarios when a person may have entered a plea of guilty before it has become apparent that the case is one in which a sec s32 or s33 application should be made.

Section 2: Pre-court diversion

Issue 7.1:

(1) Should a legislative scheme be established for police to deal with offenders with a cognitive impairment or mental illness by way of a caution or a warning, in certain circumstances?

This idea is certainly worth exploring. Like the *Young Offenders Act*, which was enacted only after much consultation and careful drafting, any diversionary scheme would need to be developed with the utmost care and attention to safeguarding the rights of vulnerable people.

(2) If so, what circumstances should attract the application of a scheme like this? For example, should the scheme only apply to certain types of offences or only to offenders with certain defined forms of mental illness or cognitive impairment?

If such a scheme were to be established, we would suggest that it should not be unduly restricted by type of offence. For example, if it were to be restricted to summary offences, this would exclude many petty offences such as shoplifting. We suggest that summary offences and indictable offences are capable of being dealt with summarily should be covered by the scheme, with police retaining discretion not to refer people to the scheme if the offence is considered to be too serious.

We do not believe the scheme should be limited to offenders with only 'certain defined forms of mental illness or cognitive impairment'. Just as 'mental condition' has a broad meaning under the current s 32 of the *Mental Health (Forensic Provisions) Act*, so should it under a diversionary scheme.

It must also be carefully considered whether a person would have to admit the offence to be eligible to be dealt with under the scheme. If this were the case, it is important that such an admission could not form part of the person's criminal history or be used against the person in any future proceedings. Given that a dismissal under s32 of the *Mental Health (Forensic Provisions) Act* does not require an admission and does amount to a finding that the offence is proved, it is difficult to see any advantage in being dealt with under a diversionary scheme in preference to s32, if diversion were to result in a finding that the offence was proved.

Any diversionary scheme would need to be resourced with funding to enable a potential participant to obtain comprehensive legal advice and to have access to a trained support person. Such support would be essential to the running of a diversionary scheme.

Issue 7.2: Could a formalised scheme for cautions and warnings to deal with offenders with a cognitive impairment or mental illness operate effectively in practice? For example, how would the police identify whether an offender was eligible for the scheme?

Whether such a scheme could work effectively in practice would depend on a number of factors, including resourcing and training.

We have reservations about whether such a scheme would work, given the difficulties faced by police in identifying mental disorders and cognitive impairments, and the fact that existing diversionary schemes (eg cautions and conferences under the Young Offenders Act) are under-utilised by police.

In some cases, it may be very difficult for police to identify whether an alleged offender is eligible for the scheme. However, it will often be known to police (or at least strongly suspected) that the person has a mental illness or cognitive impairment.

When a suspect is in police custody, it is already incumbent on the police to identify whether the suspect is a 'vulnerable person', which includes a person with impaired mental or intellectual functioning, and to ensure that person has access to a support person. However, police officers are not always able to identify these issues and would benefit from further skill development in this area. We support the appointment of specialist mental health and/or disability liaison officers (similar to specialist youth officers) at police stations.

Once police have identified a person as potentially eligible for such a scheme, there would need to be a process by which police could refer the person for an assessment (possibly through ADHC or a service akin to the Mental Health Court Liaison service). Of course, in some cases, the alleged offender's current treatment provider or carer may be able to provide documentation that would satisfy the police of the person's eligibility.

Issue 7.3: Does s22 of the MHA work well in practice?

In our experience, section 22 does not always work well in practice. This appears to be largely due to the chronic lack of resources in our mental health system. Hospitals will often interpret the terms 'mentally ill person' and 'mentality disordered person' differently, depending on how many beds are available at the time.

Issue 7.4: Should the police have an express, legislative power to take a person to a hospital and/or an appropriate social service if that person appears to have a cognitive impairment, just as they can refer a mentally ill or mentally disturbed person to a mental health facility according to s22 of the MHA?

This may be appropriate where a person has a severe cognitive impairment and, as a result, is posing an immediate risk to him/herself or others. Examples might include a person with severe dementia who has absconded from a residential facility, or a person with an intellectual disability and significant behavioural problems who requires full-time care.

It would not be appropriate for police to intervene on more general welfare grounds, or for this power to apply to people functioning in the borderline range, as this would involve a major incursion on the civil liberties of people with cognitive impairments.

Issue 7.5: Do the existing practices and policies of the Police and the DPP give enough emphasis to the importance of diverting people with a mental illness or cognitive impairment away from the criminal justice system when exercising the discretion to prosecute or charge an alleged offender?

In our experience, police generally exercise their discretion in favour of prosecution, even where the alleged offender clearly has a mental illness or cognitive impairment. The view appears to be that it should be left to the court to deal with the matter, which may involve diverting the alleged offender under s32.

Occasionally, police will decline to charge the alleged offender and instead take them to hospital for admission under the civil provisions of the *Mental Health Act*. However, it is relatively common for police to await the person's discharge from hospital and then lay charges.

It is possible that a formal diversionary scheme might encourage police to consider diversion in preference to prosecution. However, it is often the case that police are seemingly unaware that the person is suffering from a mental illness or intellectual disability.

Case study: Harry

Harry (22) had a disagreement with an acquaintance, Mick, which included a physical fight. He went to the police station to report an assault, and he also told police that Mick had a large cannabis plantation in the hills outside town. The police were very interested and drove him around to look for the plantation. After some time, it transpired that there was no cannabis plantation.

The police charged Harry with "make false accusation with intent to subject another to investigation". Harry was acutely psychotic at the time and was admitted to hospital the following day. The hospital notes recorded that he was experiencing auditory hallucinations and persecutory delusions. It is difficult to see how his symptoms could have escaped the notice of the police just one day before.

We made written representations to the police, requesting them to withdraw the charge because it was most unlikely they would be able to prove each element of the offence.

Although we conceded that Harry made a false accusation, it was unlikely that he possessed sufficient mens rea to form an intention to subject Mick to a police investigation. Further, in his delusional state it was highly likely that Harry actually believed the accusation to be true.

Regrettably, the police refused to withdraw the charge. Harry chose not to go to a defended hearing but instructed us to make a section 32 application, which was ultimately granted.

In our opinion this was a case where the police ought to have exercised their discretion not to prosecute.

We cannot comment in any detail about the DPP's policies. In our experience, it would be unusual for the DPP to 'no bill' or discontinue charges against our client because of a mental illness or cognitive impairment. However, we have seen some flexibility on the part of the DPP in deciding what charges to proceed with and what course the matter should take.

Issue 7.6: Do provisions in the *Bail Act 1978* (NSW) setting out the conditions for the grant of bail make it harder for a person with mental illness or cognitive impairment to be granted bail other than alleged offenders?

In our experience, a person with a mental illness or cognitive impairment often finds it more difficult to get bail than other alleged offenders, particularly if the alleged offence is a violent one. Lack of appropriate accommodation, treatment and care may make it difficult to address the court's concerns about the protection of the community.

Issue 7.7: Should the *Bail Act 1978* (NSW) include an express provision requiring the police or the court to take account of a person's mental illness or cognitive impairment when deciding whether or not to grant bail?

In our view, such a provision would be appropriate. However, we are not optimistic that it would make much practical difference. There is already a provision in the *Bail Act* requiring the court to take into account any special needs arising from the fact that the defendant has an intellectual disability or mental illness, but this does not seem to have assisted in achieving favourable bail decisions for these people.

Issue 7.8: What education and training would assist the police in using their powers to divert offenders with a mental illness or cognitive impairment away from the criminal justice system?

We do not have the expertise to comment on the specific type of training required. Broadly speaking, further education and training is needed, not only in assisting police to identify mental disorders and cognitive disabilities, but to improve the way police deal with people with mental health issues and cognitive impairments. For example, defusing a potentially violent situation involving a person with a mental illness, or dealing with a cognitively impaired person who is behaving in a manner that police may consider offensive, requires a degree of skill which is not universally possessed by police officers.

Section 3: Diversion under s32

Issue 7.9

(1) Should the term "developmentally disabled" in s32(1)(a)(i) of the MHFPA be defined?

If the term 'developmentally disabled' is to remain in the legislation, we believe it should be defined.

(2) Should "developmentally disabled" include people with an intellectual disability, as well as people with a cognitive impairment acquired in adulthood and people with disabilities affecting behaviour, such as autism and ADHD? Should the legislation use distinct terms to refer to these groups separately?

We believe the diversionary provisions should apply to people with cognitive impairments acquired in adulthood. The legislation seeks to divert people whose capacity is affected by cognitive impairment or mental illness; in our view it is irrelevant whether or not this was acquired before the age of 18.

A cognitive impairment acquired in adulthood is not a 'developmental disability' and therefore a different term is required.

Issue 7.10: Is it preferable for s32 of the MHFPA to refer to a defendant "with a developmental disability" rather than to a defendant who is "developmentally disabled"?

'With a developmental disability' is preferable to 'who is developmentally disabled'. As pointed out in the consultation paper, this would place emphasis on the person, rather than defining them by their disability.

Issue 7.11: Should the term "mental illness" in s32(1)(a)(ii) of the MHFPA be defined in the legislation?

We agree that the term 'mental illness' should be defined in the legislation. However, it is already defined in the *Mental Health Act* and this definition appears to be sufficient.

Issue 7.12: Should the term "mental condition" in s(32)(1)(a)(iii) of the MHFPA be defined in the legislation?

It would be helpful to define the term 'mental condition' if such a term is to be retained. The current definition is not at all helpful.

Issue 7.13

(1) Should the requirement in s32(1)(a)(iii) of the MHFPA for a mental condition "for which treatment is available in a mental health facility" be changed to "for which treatment is available in the community" or alternatively, "for which treatment is available"?

Yes. Requiring a person's condition to be one for which treatment is available in a mental health facility is too restrictive. For example, a person could have a severe personality disorder which significantly affects their functioning. The most effective ways of managing such a disorder are through cognitive behavioural therapy or dialectical behavioural therapy. DBT, in particular, is not widely available and is more likely to be available through private treatment providers than in mental health facilities.

Case study: Mario

Mario (25) suffered serious abuse during his childhood and has ongoing psychological problems. He has self-harmed and attempted suicide on numerous occasions, and as a result has been hospitalised several times.

Perhaps surprisingly, Mario has almost no criminal history. He was recently charged with shoplifting and goods in custody.

Mario was assessed by an experienced clinical psychologist, who was of the opinion that he had a personality disorder, probably borderline personality disorder. The psychologist

recommended dialectical behavioural therapy as the only treatment option that was likely to have any success.

Our enquiries revealed that DBT is offered by a very small number of practitioners, most of whom are private psychologists who bulk bill through Medicare.

We were unable to make a successful section 32 application, partly because of the difficulty in convincing the Magistrate that a personality disorder was a "mental condition", and partly because it took too long to put a treatment plan in place. This is unfortunate because, in our opinion, Mario was a suitable person to be diverted under section 32.

(2) Should the legislation make it clear that treatment is not limited to services aimed at curing a condition, but can include social services programs aimed at providing various life skills and support?

Yes, definitely, especially in the case of intellectual disability or other cognitive impairment. Social support services are crucial (in some cases more important than formal treatment) in reducing the risk of recidivism.

Issue 7.14: Should the existing categories of developmental disability, mental condition, and mental illness in s32(1)(a) of the MHFPA be removed and replaced by a general term used to determine a defendant's eligibility for a s32 order?

We see some merit in this suggestion, as long as the term is properly defined.

Issue 7.15: What would be a suitable general term to determine eligibility for a s32 order under the MHFPA? For example, should a s32 apply to a person who suffers from a "mental impairment"? How would a term such as "mental impairment" be defined? For example, should it be defined according to an inclusive or exhaustive list of conditions?

It is not easy to come up with a general catch-all term that encompasses mental illness, mental conditions, developmental disability and cognitive impairment.

In our view, 'mental impairment' is an appropriate term (at least as good as any other suggestions we have heard). As to how such a term should be defined, we believe the SA and ACT definitions provide some useful guidance. We would favour it being defined according to an inclusive, rather than exhaustive, list of conditions.

Issue 7.16: Are there specific conditions that should be expressly excluded from the definition of "mental impairment", or any other term that is preferred as a general term to determine eligibility under s32 of the MHFPA? For example, should conditions related to drug or alcohol use or abuse be excluded? Should personality disorders be excluded?

We do not favour the exclusion of any kind of condition from the ambit of s32.

In particular, we do not think that personality disorder should be excluded, as a severe personality disorder may have a significant impact on a person's cognitive and adaptive functioning, emotional regulation and behaviour.

While a substance abuse disorder on its own would rarely be appropriate for a s32 dismissal, such disorders often coexist with mental illnesses or mental conditions, particularly among young people. Excluding conditions related to drug or alcohol abuse may mean that people with a dual diagnosis may be inappropriately excluded from s32.

In our view, it is better to rely on the magistrate's discretion to screen out people who are not appropriate to be diverted under s32.

Issue 7.17: Should a magistrate take account of the seriousness of the offence when deciding whether or not to divert a defendant according to s32 of the MHFPA? Why or why not?

We concede that the magistrate should be able to take into account the seriousness of the offence when deciding whether or not to divert a defendant under s32. However, this should only be taken into account in a limited way.

Firstly, it is important to remember that s32 is not a sentencing exercise. A defendant does not have to enter a plea in order to be dealt with under s32, and in many cases may actually be innocent of the offence. A person may choose a s32 application in preference to defending the charge because of the significant difficulties faced by people with mental illnesses and cognitive impairments in the court process (for example, difficulties with memory and concentration which may affect the person's ability to give evidence).

It is important to remember that, no matter how serious the alleged offence, it is only an alleged offence. It is therefore also relevant to take into account the strength of the prosecution case and the fact that the offence might not be proved if the offender were not diverted under s32.

Issue 7.18: Should the decision to divert a defendant according to s32 of the MHFPA depend upon a direct causal connection between the offence and the defendant's developmental disability, mental illness, or mental condition?

A decision to deal with a defendant under s32 should *not* depend upon a direct causal connection between the offence and the defendant's disability or condition.

As your consultation paper points out, 'it may be overly simplistic to try to identify a direct cause for criminal conduct in the case of a defendant with a mental illness or impairment, insofar as this denies the broader context that may have given rise to the defendant's conduct and which may be years of disadvantage and marginalisation'.

Also, a decision to divert under s32 should not only be based on the defendant's level of culpability for the alleged offence. It should also recognise the difficulty the defendant may face in defending the charge if the matter were to be dealt with according to conventional criminal procedures (as noted above).

The court should also consider the defendant's ability to cope with traditional criminal sanctions such as bonds, fines and imprisonment. Even if there was no direct causal connection between the defendant's disability or condition and the alleged offence, their ability to deal with court processes and criminal sanctions may be severely limited and therefore a s32 disposition is the most appropriate outcome.

Issue 7.19: Should the decision whether or not to divert a defendant according to s32 of the MHFPA take into account the sentence that is likely to be imposed on the defendant if he or she is convicted?

In many cases it is appropriate to take this into account, but only as one of the many factors to be considered.

As we have already mentioned in our discussion of issue 7.17, it is important to remember that a defendant making a s32 application has (in most cases) not been found guilty and it is not a foregone conclusion that he or she will be convicted.

Sometimes the likely sentence if the offender were to be convicted is highly relevant, and mitigates in favour of a s32 disposition. For example, a person with a mental illness will often be assessed as unsuitable for periodic detention or community service, thus severely limiting the court's sentencing options and placing the defendant at serious risk of imprisonment if convicted.

Another (regrettably common) situation is where the defendant is alleged to have committed an offence while on a suspended sentence. In most cases, a conviction would lead to revocation of the suspended sentence and the imposition of full-time imprisonment. This is often a harsh and disproportionate outcome for someone with a mental illness or intellectual disability, especially if the court was not fully apprised of the defendant's condition at the time of imposing the suspended sentence.

Issue 7.20

(1) Should s32(1)(b) of the MHFPA include a list of factors that the court must or can take into account when deciding whether it is appropriate to make a diversionary order?

On the one hand, it may be useful to have a list of factors to guide the magistrate's discretion.

On balance we favour the inclusion of a broad, non-exhaustive list of criteria.

(2) If s32(1)(b) were to include a list of factors to guide the exercise of the court's discretion, are there any factors other than those discussed in paragraphs 3.28-3.41 that should be included in the list? Are there any factors that should be expressly identified as irrelevant to the exercise of the discretion?

There are some important factors which have not been discussed in paragraph 3.28 to 3.41, and which should be considered by the magistrate when exercising their discretion under s32. These include, for example:

- The likely consequences if the defendant is not dealt with under s32 but is likely to be found unfit to plead or not guilty by reason of mental impairment. In the Local Court, at least under the present regime, a finding of unfitness is grounds for a permanent stay and a finding of not guilty by reason of mental impairment has the same effect as a finding of not guilty.
- The defendant's ability to comprehend and cope with traditional criminal court processes. It is important to remember that s32 is about diversion from the criminal justice system, not just about alternative sentencing options for people who have been found guilty of offences. One of the reasons for s32's existence is to provide a flexible procedure that alleviates the need for cumbersome court processes which may not be appropriate to the circumstances of the alleged offence or the alleged offender.

Case study: Simon

Simon (19) has a moderate intellectual disability. His parents had very high expectations of him and refused to accept that he had a disability. This eventually led to a breakdown in their relationship and Simon went to a refuge when he was about 16.

Since then, Simon has come to the attention of the police a few times, mainly for being involved in fights, once for being a passenger in a stolen car and once for being in possession of a weapon. On most of these occasions it appears that he was "led astray" by older and more sophisticated friends.

On one occasion, Simon went for a drive with a friend. There were a couple of other people in the car who Simon didn't know. Unbeknown to Simon, they were intending to go to an acquaintances home to "speak to him" about a debt.

When they arrived at the house, they asked Simon to come in with them, which he did. Simon's companions assaulted the occupant and went through his belongings. Simon was inside the house but did not participate. However, when police arrived he was arrested along with the others. Simon was charged with aggravated break, enter and steal, a strictly indictable offence.

After some negotiation, the DPP agreed to withdraw this charge and instead lay charges of enter building with intent to steal and assault occasioning actual bodily harm in company, both of which are capable of being dealt with summarily. Usually, the DDP would only agree to this upon the entry of a plea of guilty by the defendant. However, after hearing from us and receiving a psychological report that suggested that Simon was unfit to plead, the DPP took the unusual course of laying these less serious charges without a plea being entered, and agreeing to a section 32 application.

The Magistrate who heard the section 32 application dismissed it on the basis that the offence was too serious. This was despite the fact that there were real doubts about Simon's guilt and

the fact that he had a very solid case plan involving excellent support from both government and non-government services.

After the section 32 application was refused, we indicated we would be seeking a permanent stay on the grounds that Simon was unfit to plead. The matter was adjourned to another date for another Magistrate. We renewed our section 32 application and this time it was granted. The Magistrate decided that it was more appropriate to deal with Simon under section 32, given the extent of his disability. Although the alleged offences were very serious, it appeared clear that Simon was led on by the principal offenders, and appeared to be a person who is very easily led. Her Honour also commented that the fact that Simon was able to function at an acceptable level in a supported environment should not mislead people into thinking that he could understand the court process, which requires abstract as well as concrete thinking.

Issue 7.21

(1) Do the interlocutory orders available under s32(2) of the MFRPA give the Local Court any additional powers beyond its existing general powers to make interlocutory orders?

The orders available under s32(2) do not appear to give the Local Court any additional powers.

(2) Is it necessary or desirable to retain a separate provision spelling out the Court's interlocutory powers in respect of s32 even if the Court already has a general power to make such interlocutory orders?

In our view, it is desirable to retain a separate provision along the lines of s32(2) just to reinforce the fact that interlocutory orders are available under s32.

Issue 7:22: Are the interlocutory powers in s32(2) of the MHFPA adequate or should they be widened to include additional powers?

It may be appropriate to give the court specific power to make an interlocutory order requiring the defendant to attend for assessment or treatment. Spelling out that the court has the power to dispense with bail would also be helpful. We believe the court should be encouraged to dispense with bail wherever possible, given the inflexible manner in which police usually deal with suspected breaches of bail, and the consequences of being arrested for breach of bail.

Issue 7.23: Is the existing range of final orders available under s32(3) of the MHFPA adequate in meeting the aims of the section? Should they be expanded?

The existing range of final orders available under s32(3) are not adequate to meet the aims of this section.

A magistrate will usually wish to discharge the defendant subject to conditions. The court may discharge the defendant under s32(3)(b) on the condition that they attend a particular person or place for assessment or treatment. However, if the magistrate wishes to impose other conditions – which is usually the case – the defendant must be discharged into the care of a 'responsible person'.

This causes all sorts of difficulties including identification of an appropriate 'responsible person' and defining the role of such a person. In our view, it would be preferable to provide for a conditional discharge without the need for a 'responsible person'. An option to discharge the defendant into the care of a responsible person should be retained, as it may be appropriate in some cases, for example, where the defendant has a carer or is closely supervised by a treatment provider.

Issue 7.24: Are the orders currently available under s32(3) of the MHFPA appropriate in meeting the needs and circumstances of defendants with a cognitive impairment, as distinct from those with mental health problems?

The option to discharge the defendant conditionally is appropriate for people with a cognitive impairment. However, the court's ability to impose conditions (other than a condition to attend for assessment or treatment) is dependent on the availability of a 'responsible person'.

We are aware that some service providers, while willing to work with the defendant, are very reluctant to be nominated as 'responsible person'.

This sometimes means that a defendant in a criminal matter, although they have an intellectual disability, may not be able to make an application under s32. This is despite the fact that the principles of rehabilitation and diversion that underpin the section are equally relevant to such a person.

Issue 7.25: Should s32(3) of the MHFPA include a requirement for the court to consider the person or agency that is to implement the proposed order and whether that person or agency is capable of implementing it? Should the legislation provide for any means of compelling a person or agency to implement an order that it has committed to implementing?

In practice, a court will not make an order under s32(3) unless satisfied that a particular person or agency is capable of implementing the proposed order. The person or agency will usually provide a report and, in some cases, be present in court.

As to whether the legislation should provide for a means of compelling a person or agency to implement an order, this would be only feasible if agencies were given a legislative mandate – and, importantly, the accompanying resources – to do so.

Treatment providers or case managers are often from poorly funded non-government organisations or community mental health services. In our experience, most of these services follow through with treatment plans once they have promised to implement them; however, it is not reasonable to compel them to do so without adequately resourcing them.

A s32 order incorporates a promise by the applicant, not the treatment provider, to abide by certain conditions, such as attending counselling. Resources are scarce for our clients with intellectual disabilities. It is quite possible that the prospect of an order compelling a service to abide by certain conditions may impact on whether the service is willing to provide treatment or a case plan to our vulnerable clients in the long term.

Issue 7.26: Should s32 of the MHFPA specify a maximum time limit for the duration of a final order made under s32(3) and/or an interlocutory order made under a s32(3)? If so, what should these maximum time limits be?

We acknowledge that, in some cases, the court will legitimately wish the defendant to be subject to some sort of enforceable order for longer than six months. Adjourning the proceedings prior to finalising them is a practical way of achieving this. However, we believe it is appropriate to place an upper limit on the length of the adjournment.

Our view is that, generally, the combined length of any interlocutory and final orders should total no longer than twelve months. We note that section 11 of the *Crimes (Sentencing Procedure) Act* allows the court to adjourn sentence proceedings for the purpose of rehabilitation for up to twelve months from the date of conviction.

In the case of a s32 application, there would not be a convenient point (such as a conviction or guilty plea) from which time would start running. Twelve months from commencement of proceedings may be too short a time, given that there may be some lengthy interlocutory stages (at least in more serious matters) before a s32 application is made. Twelve months from the date the s32 application is first made would perhaps be a suitable time frame.

Issue 7.27: Should the Mental Health Review Tribunal have power to consider breaches of orders made under s32(3) of the MHFPA, either instead of or in addition to the Local Court?

We do not have a strong view on this issue but believe it is worth considering.

Issue 7.28: Should there be provision in s32 of the MHFPA for the Local Court or the Mental Health Review Tribunal to adjust conditions attached to a s32(3) order if a defendant has failed to comply with the order?

Yes, there should definitely be such a provision. We believe this was the legislative intention when the Act was amended to make s32 order enforceable. On the rare occasion when a defendant is 'breached' on a s32 order, the court is usually more interested in adjusting the terms of the s32 order to ensure the defendant is able to comply, rather than punishing the defendant or reinstating the original criminal proceedings.

Issue 7.29: Should s32 of the MHFPA authorise action to be taken against a defendant to enforce compliance with a s32(3) order, without requiring the defendant to be brought before the Local Court?

We have significant reservations about this suggestion, which would presumably involve the police having power to arrest a person for breach of s32 order in a similar way to which they currently arrest defendants for breach of bail. We have seen, at first hand, the impact of bail breach action on vulnerable young people. We would not wish to see further police intervention in the lives of people who are already marginalised.

One of the court's powers under s33 is to make a community treatment order. Non-compliance may result in breach action by the treatment provider, whereupon police may detain the person and convey them to a mental health facility. While this power may be appropriate in the case of a CTO, we do not think it is appropriate for general orders under s32.

Issue 7.30: Should the MHFPA clarify the role and obligations of the Probation and Parole Service with respect to supervising compliance with and reporting on breaches of orders made under s32(3)? What should these obligations be?

If the Probation and Parole Service are to continue to have a role, it should be better defined in the Act or regulations. Currently, while the Probation and Parole Service is referred to in the Act, in practice they appear to have no role in supervising s32 orders.

In any event, we suggest that the Probation and Parole Service is probably not the most appropriate agency to monitor compliance with s32 orders. It is our view that a more specialist service would be more appropriate to supervise compliance.

Issue 7.31 Are there any other changes that should be made to a s32(3A) of the MHFPA to ensure the efficient operation of a s32?

We do not have a view on this issue.

Issue 7.32: Is there a need for centralised systems within the Local Court and the NSW Police for assessing defendants for cognitive impairment or mental illness at the outset of criminal proceedings against them?

Yes, in our view there is an need for a centralised assessment system. It is an unfortunate fact that many people who are potentially eligible for s32 diversion miss out due to lack of resources for assessments and treatment plans.

It goes without saying that a centralised assessment system would need to be very well resourced. The Mental Health Court Liaison Service provides a good foundation on which such a service could be built. Of course, psychologists with disability expertise would need to be made available to assess people with suspected cognitive impairments; this is something not currently covered by Justice Health.

Such a system should be optional – that is, the defendant could choose to be assessed by a private practitioner or agency, if this is available to them.

Issue 7.33

(1) Should the MHFPA expressly require the submission of certain reports, such as a psychological or psychiatric report and a case plan to support an application for an order under s32?

In our view this would be neither necessary nor desirable. There are many different types of documents – not necessarily psychological or psychiatric reports that can form the basis of a s32 application. In some cases it is simply not possible or feasible to obtain a comprehensive psychological or psychiatric assessment, bearing in mind the time and cost involved.

Case study: Leon

Leon (24) has a long-standing diagnosis of schizophrenia. He has had several hospital admissions and is currently on a community treatment order. It has been difficult to get a comprehensive report from his treating doctor, who works at a very busy community mental health centre and does not have a great deal of spare time or administrative support. We made a s32 application on Leon's behalf using copies of discharge summaries (to establish his diagnosis), a very short letter signed by his treating doctor and a report from his case worker setting out a treatment plan. This was accepted by the magistrate, who discharged Leon conditionally under s32.

(2) Should the Act spell out the information that should be included within these reports? If so, what are they key types of information that they should contain?

Again, this is neither necessary nor desirable. The content of reports and documents submitted to the court will vary according to the defendant's mental illness or disability, the circumstances of the alleged offence, and the nature of any proposed case plan (indeed, for some minor offences where an unconditional discharge would be appropriate, it may not be necessary to present a case plan at all).

An attempt to legislate for the content of reports would be unhelpful, and possibly allow for too rigid an interpretation of the circumstances in which an order can be made. If it was appropriate to spell out information to be included in reports, we suggest that this should be included in a Local Court practice note, along with some guidance for magistrates as to the factors to be considered in exercising their discretion under s32.

Issue 7.34: Should the MHFPA allow a defendant to apply for a magistrate to disqualify himself or herself from hearing a charge against the defendant if the same magistrate has previously refused an application for an order under s32 in respect of the same charge?

We believe there should be a provision requiring a magistrate to disqualify himself or herself, at least in limited circumstances.

There used to be a provision requiring a magistrate who refused a s32 application to disqualify himself or herself from any further hearing of proceedings if asked to do so by the defendant. This was criticised as promoting 'magistrate shopping' and was consequently repealed.

In our view, if a s32 application is refused and the defendant wishes to defend the charge, the magistrate who dealt with the s32 application should (if requested by the defendant) be disqualified from any defended hearing, as he or she will have received prejudicial information including the defendant's criminal history. If a defendant pleads guilty after an unsuccessful s32 application, we see no need for the magistrate to be disqualified from dealing with the sentence proceedings.

Issue 7.35

(1) Should there be alternative ways of hearing s32 applications under the MHFPA rather than through the traditional, adversarial court procedures? For example, should there be opportunity to use a conferencing-based system either to replace or to enhance the current court procedures?

This idea is worth exploring. Lessons could perhaps be drawn from therapeutic jurisprudence models (eg drug courts).

We would be interested in exploring the possibility of a MERIT type program for people with intellectual disabilities or mental health problems. This would allow them to be diverted at an early stage, and have access to a team of clinicians to perform assessments, develop case plans and oversee their implementation. Such a program could run for several weeks or months (the MERIT program generally runs for 3 months), with a report back to the court after this

period. If a successful case plan has been developed, the court could then consider a final order under section 32.

We would be interested in being involved in any further discussions on such a proposal.

(2) If so, should these alternative models be provided for in the legislation or should they be left to administrative arrangement?

Some diversionary schemes (eg adult Drug Court) are legislatively-based while others (eg Youth Drug and Alcohol Court) are set up almost entirely by practice direction. Others (eg MERIT) have some legislative framework but the details are left to administrative arrangements. We would prefer there to be some legislative basis so as to ensure the rights of defendants are protected. However, the finer details could be dealt with in a Local Court practice note or set of guidelines.

Section 4: Diversion under s33

Issue 7.36: Should s33 of the MHFPA require a casual connection between the defendant's mental illness and the alleged commission of the offence?

If a court decides to finalise the matter under s33, there will usually be a causal connection between the defendant's mental illness and the alleged offence.

However, s33 serves a very important purpose as an interlocutory mechanism to obtain appropriate treatment for mentally ill defendants who would otherwise remain in custody on remand. It is often the case that a defendant is acutely unwell at the commencement of proceedings, an interlocutory order is made under s33 and, after the defendant's condition has stabilised, the defendant is brought back to court to deal with the substantive proceedings.

If s33 is being used to make interlocutory orders, there should be no requirement for a causal connection between the mental illness and the alleged offence.

Issue 7.37: Are the existing orders available to the court under s33 of the MHFPA adequate and are they working effectively?

In our view, the existing orders are adequate, although the section could perhaps be better drafted. In particular, the court's power to make interlocutory orders under s33 and adjourn the substantive proceedings could be clarified.

Issue 7.38: Should legislation provide for any additional powers to enforce compliance with an order made under s33 of the MHFPA?

If an order is made under s33, the civil provisions of the *Mental Health Act* come into play. There are already adequate mechanisms in place to enforce compliance. For example, an involuntary patient who absconds from hospital can be brought back by police; a person who breaches a CTO can also be detained by police and brought to a mental health facility.

Issue 7.39: Is it preferable to abolish s33 of the MHFPA and broaden the scope of the s32 of the MHFPA to include defendants who are mentally ill persons?

No. The two sections serve different purposes and should not be rolled into one. As we have already discussed, an important purpose of s33 is to enable defendants who are seriously ill to receive appropriate treatment in a hospital rather than a prison.

Section 4: Enhancing diversion in the superior courts

Issue 7.40: Does 10(4) of the MHFPA provide the superior courts with an adequate power to divert defendants with a mental illness or cognitive impairment?

Our solicitors do not often appear for mentally ill or cognitively impaired defendants in the superior courts. We are therefore unable to comment from our own experience. However, we

understand from discussions with fellow practitioners that the court's power under s10(4) is unduly limited, and in practice is only applied to the most trivial of offences.

We would like to see a more broad diversionary scheme adopted in the superior courts.

Issue 7.41: Should s32 and 33 of the MHFPA apply to proceedings for indictable offences in the Supreme and District Courts as well as proceedings in the Local Court?

We believe there is merit in exploring this proposal, particularly in relation to indictable offences which are at the less serious end of the spectrum. In many cases, it may be appropriate for the District Court to divert a defendant rather than go through the cumbersome procedures that currently apply.

It is concerning that some of our clients who have a mental illness or cognitive impairment who are alleged to be involved with others in strictly indictable matters are subject, largely, to the same processes and principles that apply to their co-accused. For example, a young adult with a cognitive impairment charged with robbery in company will still have difficulty obtaining bail and will be housed in a mainstream adult gaol that does not cater for inmates with special needs.

Case study: Darren

Darren (18) is a young Aboriginal man who has a mild intellectual disability. He was travelling in a taxi with two others from the youth refuge where he had been residing. Unknown to Darren, two of these young people decided to rob the taxi driver. Darren was present, and was drawn in to the robbery when the others demanded he ask for coins.

Darren did not have a criminal history and was a minor player in a serious offence. There is no doubt that his disability impaired his judgement, and his response to the situation. He was refused bail because of the seriousness of the offence, the strength of the prosecution case, the likely sentence and the fact he had nowhere to live.

He spent 8 months in an adult gaol before he was released by the sentencing judge on a two-year good behaviour bond. His experience in custody was devastating. He was sexually assaulted and spoke about not sleeping during the night in case he wet his bed. He was terrified of the response by other prisoners who might discover this problem. It is our view that Darren's experience would have been dramatically different if s32 of the MHFPA applied.

In particular, we believe that the court's power to make interlocutory orders under s33 should apply to committal proceedings and not just to summary proceedings. A person may appear before the Local Court charged with a strictly indictable offence. The defendant may be acutely unwell and require treatment. The only options available to the court are to refuse bail or to grant bail, neither of which will necessarily ensure the defendant receives treatment.

Case study: Janelle

In the past twelve months, Janelle (19) developed a serious mental illness and her relationship with her parents deteriorated to the point where they kicked her out of home. Janelle was charged with aggravated break, enter and steal (a strictly indictable offence) after she broke into her parents' home and tried to retrieve some of her own belongings.

At the time of her arrest, Janelle was acutely psychotic. Janelle's solicitor asked for bail on the condition that Janelle attend her local community mental health centre immediately upon release. However, the magistrate was understandably concerned about Janelle's ability to comply with such a condition, and about what would happen if she did not attend the mental health centre and receive treatment. Reluctantly, the magistrate said that, while prison was no place for a young woman like Janelle, refusing bail was the only realistic option. The magistrate remarked that she would have sent Janelle to hospital under s33 had she been empowered to do so.

Issue 7.42

(1) Should there be a statement of principles included in legislation to assist in the interpretation and application of diversionary powers concerning offenders with a mental illness or cognitive impairment?

In our view a statement of principles may be of assistance.

(2) If so, what should this statement of principles include?

Time does not permit us to carefully consider what should be included. However, such principles should pay due regard to the rights of persons with a mental illness or cognitive impairment, including their right to obtain care and treatment in the least restrictive way. The presumption of innocence would not be forgotten. It would also be appropriate to include an acknowledgement that considerations of punishment and general deterrence are of less importance when dealing with defendants who are mentally ill or cognitively impaired and rehabilitation should be given significant weight.

General comments relating on other Consultation Papers

Unfortunately, time does not permit us to comment in details on your other Consultation Papers.

However, we wish to comment briefly on the following issues:

Consultation paper 6: Criminal responsibility and consequences

We wish to comment briefly about whether the fitness and special hearing procedures, and the defence of not guilty by reason of mental impairment, should apply in the Local Court.

In our opinion there is some role for the application of these procedures to the Local Court, but in a very limited way.

We strongly believe that diversion under s32 or 33 should be the primary option in the Local Court. Only after diversion has failed or been deemed inappropriate should the fitness and not guilty by reason of mental impairment provisions come into play.

We are strongly opposed to lengthy or indefinite detention for people who are found unfit, found to have committed the offence after a special hearing, or found not guilty by reason of mental impairment. In nearly all cases, such outcomes would be disproportionately harsh, having regard to the severity of most offences dealt with by the Local Court.

Consultation paper 8: Forensic samples

We are of the view that forensic material should be destroyed after a matter is dismissed under section 32 or section 33, if the proceedings are not brought back to court within 6 months. An order under section 32 or section 33 is not equivalent to a finding of guilt, and the defendant may in fact be innocent. We acknowledge that there may be cases involving serious charges where the prosecution case appears strong, or where the defendant is diverted under section 32 or 33 after an admission of guilty. In these situations, we would suggest that there be a procedure where the police may apply to the court for an order that forensic material be retained.

The Shopfront Youth Legal Centre
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